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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IBP, INC.,

Petitioner,

v.

HUGHES A. BAGLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Petition Clause of the First Amendment provide any protection from libel law to those who petition the Congress? Or is the only constitutional protection from a suit for libel arising from an act of petitioning the Congress that afforded by the Speech and Press Clauses (and thereby solely dependent upon whether the particular plaintiff is a public or private figure)?

II. Did the Eighth Circuit apply an impermissible test that conflicts with other circuits and with this Court's decisions to determine whether Bagley is a limited purpose public figure?

III. Did the Eighth Circuit err under *Bose* in failing to conduct an independent review of the trial record to determine whether there was clear and convincing evidence of actual malice, and by an apparent failure to conduct an independent review to determine whether the plaintiff was a limited purpose public figure?

IV. May First Amendment guarantees be vitiated by permitting the jury repeatedly to hear highly inflammatory evidence about the defendant that is of no probative value or relevance and that necessarily so inflames the jury that any First Amendment or *New York Times* jury instructions will almost certainly be disregarded?

V. Does the district court's systematic abuse of the trial process amount to a Due Process violation such that the tortious interference judgments below cannot stand?

PARTIES

The caption of the case in this Court contains the names of all parties. Petitioner IBP, inc. is a wholly-owned subsidiary of Occidental Petroleum Corporation.

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HUGHES A. BAGLEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner IBP, inc., formerly Iowa Beef Processors, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 11, 1986.

OPINIONS BELOW

The July 24, 1986 opinion of the *en banc* United States Court of Appeals for the Eighth Circuit (Petition Appendix (hereinafter "P.A.") A) is reported at 797 F.2d 632 (8th Cir. 1986). The prior Eighth Circuit panel opinion dated February 13, 1985 (P.A. C) is reported at 755 F.2d 1300 (8th Cir. 1985). The September 11, 1986 Order of the *en banc* Eighth Circuit denying IBP's petition for rehearing (P.A. B) is not reported.

The underlying judgment (P.A. D) and opinion denying IBP's motion for judgment notwithstanding the verdict (P.A. E) of the United States District Court for the Northern District of Iowa, Western Division are not reported.

JURISDICTION

This petition for writ of certiorari seeks review of the following judgments and decisions:

(i) Judgment, entered December 30, 1982, at 12:50 p.m., on a jury verdict, and order denying motion for

judgment notwithstanding the verdict or for a new trial entered on June 24, 1983 in No. 79-4087 in the United States District Court for the Northern District of Iowa, Western Division (P.A. D & E);

(ii) Decision, filed February 13, 1985, on appeal in No. 83-1894 to the United States Court of Appeals for the Eighth Circuit (P.A. C);

(iii) Decision, filed July 24, 1986, on hearing *en banc* by the Eighth Circuit (P.A. A);

(iv) Order, filed September 11, 1986, denying rehearing by the *en banc* Eighth Circuit (P.A. B).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This petition squarely raises the issue of accommodating the common law of libel with the First Amendment right to petition Congress. The case also presents for decision the correct reading of this Court's opinion last year in *McDonald v. Smith*, 105 S. Ct. 2787 (1985), as well as the precedential applicability of *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), to the Petition Clause. The Eighth Circuit is so badly fragmented as to its reading of *McDonald v. Smith* that in its *en banc* opinion denying rehearing *en banc* Judge Richard Arnold and three other members of the Eighth Circuit expressed the hope that this Court would now review the case. (The Eighth Circuit rendered a panel opinion, an *en banc* opinion and an opinion

denying rehearing *en banc*; in each instance a dissenting opinion was also filed.)

The Controversy Below and The Eighth Circuit Rulings

The cause arose when the Subcommittee on General Small Business Problems of the U.S. House of Representatives Committee on Small Business ("the Subcommittee") began an investigation of the meat packing industry to ascertain whether new legislation was necessary to protect competition. (P.A. A at 2.) Hearings began in October 1977 and were held intermittently through July 1979. At some point during this period, the Subcommittee's inquiry began to focus specifically on petitioner IBP, inc. ("IBP"), the largest company in the industry.[1] By the summer of 1979 IBP had unquestionably become the prime target of the Subcommittee. (P.A. A at 3 and 14; P.A. C at 8-9.)

In June of 1979, as the Subcommittee was preparing for another of a series of hearings that were to take place in July, the Subcommittee Chairman, Congressman Neal Smith (D-Iowa), wrote to IBP's president, Robert Peterson, on behalf of the Subcommittee. (P.A. A at 4; P.A. C at 7.) The Smith letter, in part, read:

> I wish to take this opportunity to offer you or any other officer who has personal knowledge of the firm's activities and who can speak on behalf of Iowa Beef Processors the opportunity to voluntarily appear and testify before the Subcommittee. Such a hearing would be conducted pursuant to the Rules of the Committee on Small Business, a copy of which is included with this letter. Essentially, the witness or witnesses appearing

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[1] Defendant IBP is a Delaware corporation with its principal place of business in Nebraska. Plaintiff Hughes A. Bagley ("Bagley") is a citizen of Iowa, and the amount in controversy exceeds $10,000.00. Federal jurisdiction in the court of first instance was predicated upon diversity of citizenship. 28 U.S.C. § 1332 (1982).

> on behalf of Iowa Beef Processors would have the opportunity to appear under oath and present a written statement of reasonable length which would be made a part of the Subcommittee's hearing record. Following the submission of this written statement and an oral presentation of reasonable length, the witness or witnesses appearing on behalf of Iowa Beef Processors would be questioned by members of the Subcommittee.

The letter went on to make clear that IBP was the principal target of the Subcommittee's inquiry:

> [T]he questions can be expected to cover a broad range of topics and issues pertinent to the Subcommittee's inquiry[,] . . . includ[ing] matters raised by the so-called "Bagley documents," the reported expansion efforts of IBP into the Western portion of the United States, matters involving the labor and transportation practices and relationships of IBP, activities of IBP in the areas of meat pricing and cattle futures, the procurement practices of IBP in obtaining live cattle for slaughter and other possible topics . . . .
>
> *As you know, a great deal of testimony received by this Subcommittee has been in regard to Iowa Beef Processors. If new legislation or rules are enacted to limit dominance by any companies in the meat industry or to ensure that enough competition remains in the industry to prevent undesirable economic consequences, it is clear that Iowa Beef Processors will be one of the companies most affected.*

(P.A. A at 5-6; P.A. C at 8-9 (emphasis added).)

The letter's reference to "the so-called 'Bagley documents' " relates to several thousand pages of internal IBP business records that Bagley, the plaintiff and a former vice president for retail sales development of IBP, had taken with him when he left the company's employ in July of 1975. (P.A. A at 3.) The documents included IBP weekly profit and loss statements, monthly production and sales

reports, confidential legal memoranda, president's staff meeting reports, data concerning customers and their purchasing behavior, and memoranda outlining the company's goals, marketing strategies and pricing formulas.[2] (P.A. A at 3; P.A. C at 5.) After leaving IBP, Bagley shared his cache with attorneys who represented (and also with other attorneys who were looking to represent) plaintiffs in antitrust litigation against IBP. (P.A. C at 6.)

The Subcommittee heard testimony at its July 1979 hearings from only one witness—Bagley. (P.A. C at 9.) In a prepared opening statement, Bagley began by accusing IBP of attempting to " 'monopolize the packing industry,' " and declaring that he had shared the documents with the antitrust lawyers who were acting against IBP because he " 'could see that somebody somehow had to stand up and be counted, or IBP was going to swallow up all of its smaller competition.' " He said that he "'felt that [the lawyers] might be a starting point of my becoming involved in at least trying to prevent a massive takeover by IBP of the packing industry.' "[3] (P.A. C at 9.)

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[2] Subsequent to leaving IBP Bagley also obtained some additional documents containing IBP production figures and documents generated by IBP's formula pricing committee from Charles Overstreet and Hans Aarsen, two other former IBP employees. The Subcommittee's reference to "the so-called 'Bagley documents' " apparently includes those documents as well as the ones Bagley took with him when he left IBP. (P.A. C at 5 and n.8.)

[3] Bagley's other efforts to prevent what he characterized as an impending "massive takeover by IBP of the packing industry" included appearing on a television documentary about bigness in the food industry (Tr. 510-511; IBP Exhibit (hereinafter "IBPX") 105a; Bagley Dep. 532-535), moving for and obtaining a court order partially lifting a protective order so as to permit him to make the documents he had taken from IBP available to the Subcommittee (P.A. A at 4), and spending eight days giving information informally to Subcommittee staffers prior to appearing as the sole

(footnote continued on next page)

Bagley's testimony before the Subcommittee at the July hearings included numerous sensational claims of misconduct on the part of IBP. The most important of those allegations for purposes of the present action dealt with a discount that IBP had offered its customers in 1975 on a product called "Cattle-Pak." Bagley charged that the discount was in fact a continuation of an earlier quantity discount program that had been discontinued in 1973 when IBP began to doubt that it could be cost-justified. (P.A. A at 6.)

IBP did not offer a witness to testify before the Subcommittee, and the Subcommittee did not subpoena any IBP officers or personnel. IBP did, however, send a written response to the Chairman and members of the Subcommittee after the July hearings had been completed, urging the Subcommittee not to take action against IBP. (P.A. F.) IBP's communication to the Subcommittee charged that the Chairman had "chosen only those witnesses [such as Bagley] bearing particular grudges against IBP," (P.A. F at 8) and had otherwise "manipulate[d] the Subcommittee proceedings" (P.A. F at 44) and transformed them from a search for the truth into a "one-man vendetta" against IBP. (P.A. F at 43.) IBP explained that it had declined to send a witness to testify before the Subcommittee because it believed that due to the Chairman's "demonstrable prejudice" against IBP, the company would not have received a fair hearing. (P.A. A at 7; P.A. C at 10.)

IBP's submission appealed to the "open-minded members of [the] Subcommittee, the media, the cattle and beef industry, and the public . . . ." The document specifically rebutted each of the charges that had been leveled against IBP by Bagley, as well as a number of charges made against IBP by others during the two years of Subcommittee hearings. In the course of so doing, the credibility of the witnesses who had testified against IBP were challenged, including its perceived chief accuser, Bagley. Bagley was specifically

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witness ("subpoenaed") at the July, 1979 hearings. (Tr. 478-483; IBPX 88 at 6-19 and 49-59.)

charged with stealing IBP business records and with perjuring himself before the Subcommittee in respect to his testimony about the Cattle-Pak discount program. (P.A. A at 7-8 and 14; P.A. C at 11-13.)

Bagley subsequently brought this action against IBP alleging that he had been libelled by IBP's communication to the Subcommittee.[4] The district court, after a jury trial, entered judgment for compensatory and punitive damages on the libel claim in the amount of $6 million.[5]

The libel claim was based upon the charges in the submission of stealing documents and perjury before the Subcommittee. (P.A. A at 9.) The trial court instructed the jury that the two statements complained of were libelous *per se* under Iowa common law, and accordingly Bagley was not required to prove that the statements were false, but rather IBP bore the burden of proving that they were true. (P.A. A at 10.)

On appeal, a divided panel of the Eighth Circuit held that instruction to have been error, reversed the judgment on the libel count and remanded it to the district court. (P.A. C at 29-31 and 35-36.) The panel ruled that the IBP response to the Subcommittee was petitioning activity protected by the First Amendment (P.A. C at 14-17), and that because of that activity Bagley was "analogous to a limited public figure in the context of petitioning the government." (P.A. C at 28.) The panel held that Bagley would therefore be required to prove *New York Times* "actual malice" by clear and convincing evidence in order to recover even compensatory damages in any retrial. (P.A. C at 25-30.)[6] Judge George Fagg dissented from the decision and would have affirmed the whole $9.33 million judgment.

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[4] Bagley's suit also included counts alleging tortious interference with present employment and tortious interference with prospective employment. (P.A. A at 2.) The tortious interference with present employment claim is discussed in the text, *infra*.

[5] The district court also entered judgment in the amount of $650,000 on the interference with present employment claim, $350,000 on the interference with prospective employment claim, and $2.33 million in prejudgment interest. Bagley's total award was thus $9.33 million. (P.A. C at 2.)

[6] The panel majority declined to conduct an independent review of the record to determine for itself whether clear and convincing

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The Eighth Circuit then reconsidered the case *en banc*. Judge Fagg wrote the opinion for the 6 to 3 *en banc* majority which held, as had the panel majority, that the jury instructions improperly relieved the plaintiff of the burden of proving falsity. (P.A. A at 25-27 and 31.) After an extensive examination of the question the *en banc* majority further ruled, as had the panel majority, that IBP's response to the Congressional Subcommittee constituted genuine petitioning activity protected by the Petition Clause of the First Amendment. (P.A. A at 12-15.)

However, the *en banc* majority held that notwithstanding its determination that the IBP communication was protected by the Petition Clause, imposition of the actual malice standard upon Bagley for the recovery of compensatory damages nevertheless depended solely upon whether Bagley was a public or private figure (P.A. A at 16-19); the petitioning activity was not a relevant factor—only Bagley's particular status. The *en banc* majority found Bagley to be a private figure despite his extensive post-employment involvement in the controversy over the adequacy of competition between IBP and others in the meat industry. (*Supra*, at 5 and note 3.) The *en banc* Court therefore remanded with instructions that in the new trial the *New York Times* actual malice standard was not applicable to Bagley.[7] (P.A. A at 19-27 and 30.)

Judges Bright and Arnold, who had been the panel majority, dissented. Joined by Judge McMillian, the dissenters wrote that for the reasons set forth in the panel majority opinion, the *New York Times* standard had to be met for Bagley to obtain even compensatory damages. (P.A. A at 31-32, Bright, J., McMillian, J. and Arnold, J., concurring in part and dissenting in part.)

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evidence of actual malice sufficient to permit a retrial existed, but instead remanded the libel count to the district court with instructions that that court conduct such a review and that it permit a retrial only if the district court first satisfied itself that sufficient evidence of actual malice existed. (P.A. C at 30-31.)

[7] The *en banc* majority held that because it had found Bagley to be a private figure, it was not required to conduct an independent *Bose* review of the record. (P.A. A at 27.)

IBP filed a petition for rehearing, arguing that the *en banc* Court had "grievously misread" this Court's opinion in *McDonald v. Smith*, 105 S. Ct. 2787 (1985), in holding that notwithstanding IBP's petitioning activity the imposition of the actual malice standard upon Bagley was solely dependent upon his status as a public or private figure. The *en banc* Court denied the petition for rehearing, in an opinion that adhered to the view that even though petitioning was involved here the actual malice standard for recovery of compensatory damages applied *only* if Bagley was a public figure. (P.A. B at 2.)

A four judge minority,[8] in an opinion written by Judge Arnold, dissented. Judge Arnold wrote, in part:

> I respectfully dissent from the denial of the petition for rehearing.
>
> Ordinarily, I would be content with the dissenting opinion previously filed by Judge Bright, in which Judge McMillian and I joined. The Court en banc has ruled, after full consideration, and there is not much point in pursuing the matter further in this Court (though the Supreme Court may find the case interesting, and I hope it does). I write separately at this time simply to take note of the point made in the petition for rehearing: that *McDonald v. Smith*, 105 S. Ct. 2787 (1985), establishes that "*whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication and not the *status* of the defamation plaintiff is the touchstone." This summary of *McDonald*, which I have quoted from page 1 of the petition for rehearing, is, in my view, correct.

(P.A. B at 3-4 (Arnold, J., dissenting) (emphasis in the original).)

The Libel "Evidence" Below

As part of Bagley's evidence of libel and in his case in chief he was permitted to introduce, over objection, evidence of numerous alleged past wrongs unrelated to the alleged

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[8] Judges Arnold, Bright, McMillian and McGill.

libel that Bagley claimed had been committed by IBP. The evidence allowed before the jury by the trial court included:

(1) testimony that IBP and its former (and by then deceased) chairman had been convicted of conspiracy to bribe union officials five years before the alleged libel (Tr. 272, 571-580, 1579, 1593-1594, 1706-1707; IBPX 88 at 12-13, 16-17, 47-49);

(2) testimony that IBP had "Mafia connections" (Tr. 1785, 1740-42, 1709-1710, 1744, 1763, 1768, 2145);

(3) testimony that IBP had threatened plaintiffs in certain antitrust litigation against IBP and refused to buy their cattle unless they withdrew from the lawsuit (Tr. 379-381);

(4) testimony that IBP had engaged in anti-union tactics and "was looking for a strike in order to destroy the [meat cutters] union" (Tr. 428-431, 1743-1745);

(5) testimony that IBP was being investigated for "tampering with a government witness" (Tr. 1830-1831);

(6) testimony that IBP had engaged in unlawful price discrimination (Tr. 87-88, 256-272, 287-295, 948, 1425-1426, 1576-1578, 2139);

(7) testimony that IBP had engaged in below-cost predatory pricing (Tr. 462-465, 410-414, 946-947, 2211; Bagley Exhibit (hereinafter "BX") 16); and

(8) testimony that IBP's former chairman had threatened the wife (as well as the new company) of a former IBP officer, and had otherwise consistently mistreated IBP personnel (Tr. 1046-1047; 933-935).

In addition, the entire 31-page IBP submission to Congress containing IBP's rebuttal of numerous other allegations of wrongdoing unrelated to the issues in the case was presented to the jury. Then Bagley's counsel was permitted to tell the jury at closing argument that even more was known about IBP's alleged wrongful activities that the jury had not been told. (Tr. 2209.)

Petitioner argued below that such evidence and argument, even if the instructions to the jury had been correct, strong and clear, necessarily inflamed the jury. The result was to

preclude any verdict save for the plaintiff, thereby effectively undercutting First Amendment and *New York Times* guarantees. (Brief for Appellant at 59-64.) Both the panel and the *en banc* Court were troubled by the introduction of such evidence to the jury,[9] but left unclear whether this evidence could be introduced on retrial.[10]

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[9] The panel wrote:

"We reject IBP's contention that the trial court's admission of evidence deprived it of a fair trial. We do not believe that the closing argument presented by Bagley's attorney so exceeded proper bounds as substantially to affect the fairness of the trial as a whole. Our affirmance on this issue, however, is not binding on remand. The previous trial and now this appeal have, in our view, crystallized the issues in this case. It may well be that on retrial the district court will find it expedient to reconsider the probative value of particular pieces of evidence and once again determine whether that value is outweighed by the danger of unfair prejudice."

(P.A. C at 33.)

The *en banc* Court wrote:

"We also have no need to address IBP's various evidentiary challenges. We do note, however, that the rulings challenged by IBP, even if erroneous, were not so prejudicial as to deny IBP a fair trial and require the reversal of Bagley's other judgments. On retrial of Bagley's libel claim, IBP is free to challenge again the Court's rulings, and, in light of the relatively narrow issues to be tried, the district court should consider not only whether this evidence is relevant to the issues being tried but also whether the probative value of these various pieces of evidence is sufficient to outweigh their potentially prejudicial effect."

(P.A. A at 27-28.)

[10] Both the panel and *en banc* opinions affirmed Bagley's judgment for tortious interference with present employment (with some modification of the calculation of prejudgment interest), notwithstanding the Eighth Circuit's discomfort with the admission of the inflammatory evidence and argument to the jury. (P.A. C at 31-35; P.A. A at 28-30.)

REASONS FOR GRANTING THE WRIT

I.

THE DISSENTERS BELOW WERE CORRECT THAT THE EIGHTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S DECISION IN *McDONALD v. SMITH*

All six Eighth Circuit opinions hold that IBP's communication constitutes genuine petitioning activity protected by the Petition Clause. (P.A C at 14-17; P.A. C at 36; P.A. A at 12-16; P.A. A at 31; P.A. B at 1-3; P.A. B at 3-4.) The *en banc* Court held, however, that an exercise of the petitioning right in and of itself provides *no* privilege whatsoever from a libel suit. The only constitutional protection potentially available to IBP was held to be that provided to *all* speech—*i.e.*, the constitutional privilege that hinges upon whether the particular plaintiff's status is public or private. (P.A. A at 16-19.) The Eighth Circuit ruled that because Bagley is a private figure, IBP was not entitled to the benefit of the actual malice standard for compensatory damages. (P.A. A at 19-25.)

The Eighth Circuit's holding that there is no constitutional privilege for petitioning *qua* petitioning renders the Petition Clause meaningless in a suit that claims libel from the act of petitioning; historically, a favorite tool to suppress petitioning has been a threat of a charge of libel. But nevertheless, under the Eighth Circuit's holding, petitioning by a private person is in fact given no greater libel protection than is given to speech about private persons. We believe such a denigration of the petition clause is wrong. The dissenting judges below were correct that the Eighth Circuit's holding conflicts with *McDonald v. Smith*, 105 S.Ct. 2787 (1985), and in their tacit urging of this Court to hear the case. Additionally, we believe that the Eighth Circuit's decision is at loggerheads with at least three hundred years of common law history and the constitutional struggle to secure the right to petition without fear of punishment.

In *McDonald* this Court briefly reviewed the history of the petitioning privilege, and held that petitioning is entitled to its own constitutional privilege against libel for its exercise. *McDonald* held the *New York Times* "actual malice" standard to be the appropriate measure of constitutional protection for petitioning; the opinion assumed that the actual malice stan-

dard is constitutionally required in all petitioning cases.[11] Indeed, it is clear from the history and legal precedents cited in *McDonald* that the constitutional privilege arises because of the *act of petitioning*, and not because the subjects of the petition are public figures.[12]

As *McDonald* teaches, a watershed in establishing the right to petition is the English Bill of Rights of 1689, a document exacted from William and Mary upon their succession to James II's throne. In 1688, James II had suspended an Act of Parliament that placed restrictions on Catholic subjects and required that the King's suspension proclamation be read from all pulpits. The Archbishop of Canterbury and six other prominent Protestant bishops petitioned James to be relieved of that obligation, arguing in their petition to the King that his suspension of an Act of Parliament was illegal. The King, angered at the petition, ordered the seven Bishops to be imprisoned in the Tower and tried for seditious libel for the content of their petition. At their trial the Bishops argued that they could not be held liable because they had a right to petition the King and that was all they had done. As one of the defense counsel summed up, "[I]f this should be a libel, I know not how sad the condition of us all would be, if we may not petition when we suffer." *Trial of the Seven Bishops*, 12 Howell's State Trials 183, 395 (1688).

The Bishops were acquitted, but the fact that they had even been brought to trial became a major catalyst for the Glorious Revolution that resulted in James II being succeeded by William and Mary and the right to petition becoming a part of the 1689 Bill of Rights. Presser, *Seven Bishops'*

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[11] The plaintiff in *McDonald* was seeking to be appointed a United States Attorney, *McDonald v. Smith*, *supra* at 2789, and was therefore a public figure plaintiff. The *McDonald* Court thus had no need to expressly hold that the result under the Petition Clause would have been the same had the case been brought by a private figure.

[12] Signally, even Bagley is at loggerheads with the *en banc* Court on this crucial point. In his petition for certiorari, Bagley states, "In *McDonald v. Smith*, the Supreme Court held that a defendant in a libel action is entitled to a qualified privilege if the defamatory publication is involved in the right to petition the government under the First Amendment to the Constitution." Petition for certiorari at 5 (citation omitted).

Trial, 9 The Guide to American Law 222, 225 (West 1984); 8 English Historical Documents 1660-1714 (A. Browning ed. 1953); M. Ashley, The Glorious Revolution of 1688 (1966); D. Lovejoy, The Glorious Revolution in America, 220-38 (1972). Other English attacks upon petitioning by claiming the petitioners were guilty of libel are reported in *Lake v. King*, 1 Saund. 131 (1680), and *Fairman v. Ives*, 5 Barn. & Ald. 642 (1822).

The technique of discouraging petitioning by libel was also attempted in this country early in our history. In 1798 and 1799, Congress received several petitions seeking repeal of the notorious Alien and Sedition Acts, and arguing that the acts were unconstitutional. 5 Annals of Congress 2798-99 and 2757-59 (1799). The proponents of the acts (the Federalists) urged such petitions should be suppressed and that the petitions should not be considered by Congress because they constituted a libel. The response to this effort was the urging by the Republicans that libel did not defeat this constitutional right. Rep. Edward Livingston (R.-N.Y.) asked,

> To what would the gentlemen reduce the right of petitioning? Have not the people a right . . . to say to Congress, "You have done wrong, you have exceeded your powers." If they think so, who shall stop their mouths, since the Constitution has guaranteed them this right?

Id. at 2799-800. *See also, id.* at 1711 (1798) (Rep. Macon), 1719 (Rep. Brent), 2801 (Rep. Gallatin), and 2957-58 (Rep. Gallatin) (all arguing that if libel defeats the right to petition, the First Amendment Petition Clause is reduced to a nullity).

Congress rejected the Federalists' attempt to suppress by libel the right to petition, and the "libelous" petitions were referred to the Committee of the Whole for consideration. *Id.* at 2802-03 and 2959.

Half a century later, another attempt to inhibit petitioning by claiming libel occurred and again was unsuccessful. In *White v. Nicholls*, 3 How. (44 U.S.) 266 (1845), this Court, in dealing with a common law libel action based on statements made in petitions to the President and Secretary of the Treasury, reviewed the common law libel privileges and held

that petitioning *qua* petitioning was privileged.[13] *White* was the principal authority cited with approval and relied upon by this Court in *McDonald v. Smith*.

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[13] At the time *White* was decided, the common law of libel presumed that all defamatory speech was uttered with "malice" in the common law sense of spite or ill will, 3 How. (44 U.S.) at 286 and 291; moreover, the presumption of "malice" included the presumption that the offending words were false. *Id.* at 284. Privileged speech was speech which, *judged by the occasion*, represented situations in which it was inappropriate to presume that the speaker spoke falsely and maliciously—*i.e.*, with "malice." Among the privileged situations was petitioning. *Id.* at 286-92.

The *White* Court held that the petitioning privilege at common law was a protection from liability in the absence of specific proof by the plaintiff of what *White* called "actual malice," *id.* at 289, or "express malice." *Id.* at 291. The proof necessary to overcome the privilege—*i.e.*, proof that would be deemed sufficient to establish common law malice—was proof of (1) falsity, and (2) the absence of probable cause—in other words, falsity and fault. *Id.* at 291. Today, of course, those elements are required to be proved as a prerequisite to liability for all non-privileged speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558, 1563-64 (1986). Speech that is in fact "privileged" is now afforded the higher protection of requiring the plaintiff to prove knowing falsehood or reckless disregard. *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617, 624 (1984); *Schulze v. Coykendall*, 218 Kan. 653, 545 P.2d 392, 399 (1976); *Gaynes v. Allen*, 128 Mich. App. 42, 339 N.W.2d 678, 679-82 (1983); and *Bender v. City of Seattle*, 99 Wash. 2d 582, 664 P.2d 492, 504-05 (1983) (all holding that in the post-*Gertz* period common law libel privileges are also defeasible only upon proof of knowing falsehood or reckless disregard).

In *New York Times*, this Court adopted one of the terms that had been used by the *White* Court to describe the petitioning privilege at common law—"actual malice"—to describe the "knowing falsehood or reckless disregard" standard that would have to be met to overcome the privilege for speech about public officials. Thus, between the time of *White* and that of *New York Times* the law had so changed that what was in the beginning a privilege is now the rule for all speech; privileged communications are now accorded the knowing falsehood or reckless disregard level of protection, but still under the rubric of "actual malice".

In this century, the constitutional privilege of petitioning *qua* petitioning, *i.e.*, as a separate and distinct privilege, has been recognized by this Court and other courts as providing constitutional protection from (a) the antitrust laws, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-40 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-71 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972), (b) the labor laws, *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 740-43 (1983), (c) the civil rights laws, *Gorman Towers, Inc. v. Bogoslawsky*, 626 F.2d 607, 614-15 (8th Cir. 1980), and (d) various state statutory and common law causes of action other than libel. *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1316-19 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972). All of these cases were decided solely on whether there was in fact an exercise of the petitioning right, and none on the special status of any person or group that was the subject of the petition.

We submit that in light of the constant use of libel to suppress petitioning, it would be a constitutional aberration if the libel suit is favored vis-a-vis petitioning while causes of action such as antitrust, the labor laws or civil rights are not so deferentially treated.[14] This Court has squarely held that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Limitations are imposed by the Speech and Press Clauses when the plaintiff has public status, *New York Times, supra; Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); limitations should be imposed by the Petition Clause whenever the defendant is engaged in *genuine*, *i.e.*, bona fide, petitioning of the Government.

Justice Brennan observed in *McDonald* that the Petition Clause may well at times overlap with the Speech and Press

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[14]The Eighth Circuit has acknowledged that the protection afforded by the Petition Clause should not vary depending upon the type of claim under consideration. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, No. 85-1805, slip op. (8th Cir. Aug. 26, 1986) (available on LEXIS, see p. 7 of LEXIS opinion).

Clauses, *McDonald, supra* at 2792-93, n.2 (Brennan, J., concurring), and the observation is manifestly correct. However, the dichotomy between the two distinct rights still exists constitutionally and historically; the two rights have never been melded into one prior to this case. The Speech and Press Clauses have as their root purpose the encouragement of robust debate in the marketplace of ideas and the fostering of dialogue among and between the general populace; the Petition Clause serves the separate purpose of encouraging candid and open communication about governance to those who govern by those who are governed. There is plainly an interrelationship and overlap between the two rights, but they are independent guarantees that serve separate societal values. *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The Eighth Circuit's opinion effectively drums the Petition Clause out of the Constitution when a petition is challenged for defamation. Indeed, the result of the Eighth Circuit's decision in this case is that a petitioner to the Government is afforded no more "breathing space," *New York Times, supra* at 271-72, than is afforded to run-of-the-mill speech involving totally private individuals. The Eighth Circuit has thus determined as a matter of constitutional policy that the citizen's right to communicate to the Government (here, the Congress) concerning his wants and needs (and here his fears) is deserving of the lowest level of values assigned to democratic communication. We believe, quite to the contrary, that the right to petition is crucial to representative government and organized liberty, and that the Eighth Circuit erred in ascribing to petitioning the lowest permissible protection constitutionally allowed.

The public/private figure distinction drawn in *Gertz v. Robert Welch, Inc., supra*, was predicated on a balancing of promoting free expression and protecting reputations. The balance was held to tip in favor of free expression, and to require additional "breathing space," whenever public persons were involved because of the importance of such speech to the core values protected by the Speech and Press Clauses—i.e., promoting robust debate on public questions.

See New York Times, supra at 270. Speech about public issues is at the "core" of the First Amendment because it is the stuff of self-government. As this Court held in *Garrison v. Louisiana*, 379 U.S. 64 (1964), "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (Quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

Petitioning the Government is as critical and central to republician self-government as is the right to freely speak about public affairs to the electorate. It may in some circumstances be even more so. Petitioning is the constitutionally declared way for the governed to communicate their desires and concerns to their elected representatives and, as such, is as inseparable from the concept of representative government as is the right to vote. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court held that,

> The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id. at 575.

If the "core" activities protected by *New York Times* require actual malice breathing space for effective exercise, so also must the equally ranked "core" activity of petitioning. And, *a fortiori*, since private individuals and institutions are often inextricably bound up in a matter involving the Government, especially in the affairs of this era, the right to petition, to be effective, *must* include within the "actual malice" penumbra the ability to discuss all the participants regardless of their status. The breathing room and vitality of a petition should not be contingent upon whether those

involved in influencing Government activity or decisions are public or private persons.[15]

Finally, if petitioning is a "core" activity, the present case is the "core" of the "core." IBP here was not seeking a benefit from Government or an affirmative policy change; rather, it was the Government that was initiating a change in the law to IBP's detriment, and IBP was defending itself, hoping to *prevent* the Government from moving against the company. IBP, under severe Congressional attack (P.A. A at 2-6), was as much involved as any grand jury target, and exercised its petitioning right to try to protect itself from an encroachment that was in reality an economic punishment. If the Constitution ever protects the right to petition, it must be in such a defensive context.

At common law, one of the categories of speech always privileged was that made in reply to charges leveled against the speaker. *See, e.g., Haas v. Evening Democrat Co.*, 252 Iowa 517, 107 N.W.2d 444, 453 (1961); *Gettis v. Kilgo*, 128 N.C. 402, 38 S.E. 931, 933-36 (1901); *Israel v. Portland News Publishing Co.*, 152 Or. 235, 53 P.2d 529 (1936). If the charges are made in a Government forum, a petition responding and urging Government non-action is not only a reply to such charges (and thus privileged at common law), but is "defensive" petitioning.[16] Such defensive petitioning is clearly also a significant constitutional

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[15] In the analogous setting of judicial proceedings, the common law recognizes that private individuals must at times be discussed in order to convey the evidence to the trier of fact, and thus holds privileged *all* statements made in judicial proceedings. *Beeck v. Kapalis*, 302 N.W.2d 90, 97 (Iowa 1981); *Yaselli v. Goff*, 12 F.2d 396, 402-03 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); Restatement (Second) of Torts § 585, Comment e (1977).

[16] In this case, the *en banc* Court specifically recognized that IBP's petitioning was "defensive in nature." (P.A. A at 14.) Incongruously, the Court declined to override the trial court's ruling that IBP was not entitled to instructions regarding that common law privilege. (P.A. A at 10-12.) The result reached by the Eighth Circuit is all the more disturbing when one takes into account the fact that Bagley's libels of IBP that led to IBP's response are *absolutely* privileged because they were made in testimony before the Subcommittee. Restatement (Second) of Torts § 590A (1977); *see also* P.A. C at 17-18.

bulwark against unfair, unfounded or unwise action by the Government against members of the electorate.

Plainly, when one petitions the Government to defend himself against adverse action urged upon the Government by others, the protection of the actual malice standard is necessary to provide "breathing space," essential to the effective exercise of the right. In the judicial setting, that right would be accorded absolute protection; it is constitutional error to label such activity as simply ordinary speech, deserving of *no* special protection, when the setting is the Congress.

In sum, as Judge Arnold noted in his dissent from the denial of rehearing *en banc*, the Eighth Circuit has misread *McDonald v. Smith* and the historical precedents. The nature of the communication and not the public or private stripe of the plaintiff must determine the existence of the privilege or the Petition Clause has been stripped of its central meaning. We re-echo the hope of Judge Arnold and his three colleagues that the Court will hear this case and resolve the scope of the Petition Clause in libel suits; the issue will arise again and the law is totally unsettled.

II.
THE EIGHTH CIRCUIT'S TEST FOR LIMITED PURPOSE PUBLIC FIGURE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

There was clearly a public controversy over whether IBP was stifling competition in the meat industry. Congress was scrutinizing IBP, some antitrust litigation had begun, more was being planned, and the media was focusing on the dispute. (P.A. A at 2-4 and 21; P.A. C at 6-7; Tr. 510-511.) Bagley voluntarily thrust himself into this controversy, as he put it, to "stand up and be counted" in order to prevent IBP from "swallow[ing] up all of its smaller competition," and "to prevent a massive takeover by IBP of the packing industry." (P.A. C at 9 and 28.)

Bagley delivered IBP documents and information about IBP to antitrust lawyers and Congressional staff (in the latter

case, voluntarily moving to partially vacate a protective order to permit him to do so (P.A. A at 4).[17] He wrote and delivered before the Subcommittee a public statement accusing IBP of "attempt[ing] to control and monopolize the packing industry," (P.A. C at 9), and appeared on a television program about the issue. (Tr. 510-511; IBPX 105a).[18] Nevertheless, the Eighth Circuit declared Bagley was a purely private person and not even a limited public figure. The Eighth Circuit committed constitutional error first by applying an impermissible test to define "the controversy," and then by its definition of the character and kind of acts sufficient to create limited public figure status.

The Eighth Circuit failed to recognize that the Subcommittee inquiry, the antitrust activity and the press attention were all manifestations of a single public controversy over the meat industry in general, and IBP's alleged role in stifling competition in particular. Instead of defining "the controversy" in terms of the *issues* that were the subject of debate in various fora, the Eighth Circuit equated "the controversy" with a particular *forum* at a particular time and place, even though that discrete event was only a setting for

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[17] Bagley, on his own volition, moved to partially lift a judicial protective order to enable him to provide the IBP documents to the Subcommittee. (P.A. A at 4.) Nevertheless, the *en banc* Court characterized all of Bagley's dealings with the Subcommittee, including his eight days of private meetings with staff members, as having been undertaken "under subpoena," and thus not properly to be taken into account in determining public figure status. (P.A. A at 4 and 22-23.) The Rules of the House, however, make clear that witnesses may be subpoenaed only to testify before committees and subcommittees. Rules of the House of Representatives, Rule XI, *see esp.* Cl. 2(m); *see also* Cl. 1(b); 2(g); 2(h); and 2(k). Private meetings with staff members to prepare for hearings and petitioning a court for documents are clearly purely voluntary matters, and bear heavily upon Bagley's limited public figure status.

[18] Although the television show was aired after IBP sent its letter to the Subcommittee, there is no suggestion in the record that the IBP letter prompted Bagley's appearance on the show or created a controversy that had not previously existed. Bagley's television appearance thus bears heavily on his continuing voluntary attempts to influence the resolution of the controversy.

one part of a broader, ongoing debate. The Court held that, "[T]he particular controversy 'giving rise' to IBP's defamatory letter was the Subcommittee's increasingly antagonistic inquiry into numerous IBP business practices." (P.A. A at 21.) Having chosen to call one facet of the debate "the controversy," the Court, not surprisingly, found that Bagley's issue-influencing activities that fell outside of that particular segment were not a part of his attempts to involve himself and influence the outcome of what the Court had distilled out as "the controversy." (P.A. A at 24-25.)

The Eighth Circuit's defining of "the controversy" in the very narrow context of one public proceeding, when the controversy here is widespread both area-wise and time-wise, conflicts with the decisions of this Court and of other Circuit Courts of Appeals. In *Gertz v. Robert Welch, Inc. supra*, this Court recognized that it is the controverted issues, and not a particular forum of discussion of those issues, that defines the scope of "the controversy." The Court recognized there that a coroner's inquest, a criminal prosecution and a civil lawsuit arising out of a fatal shooting by a police officer were all aspects of one public controversy over the shooting. *Id.* at 352.

Decisions of other Circuit Courts of Appeals have faithfully followed the *Gertz* approach. In *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986), the particular statement alleged to be defamatory concerned the plaintiff's participation as an expert witness in a civil lawsuit challenging the safety of the drug Bendectin. The District of Columbia Circuit recognized that the particular lawsuit was merely one facet of the debate over the safety of the drug. Accordingly, the *McBride* court defined "the controversy" in terms of the drug safety issues, rather than in terms of a particular forum in which the issues were then being debated. *Id.* at 1211.

The Eighth Circuit here, having defined "the controversy" as the Congressional hearing, gave no consideration to Bagley's efforts to assist the plaintiffs and potential plaintiffs in the antitrust litigation. In *McBride*, by contrast, the D.C. Circuit found of significant consequence the plaintiff's testi-

mony about the drug before the Food and Drug Administration in determining public figure status even though the alleged libel related to his participation as an expert witness in a lawsuit. The *McBride* court ruled that the plaintiff's voluntary assistance to one side in the lawsuit and his testimony before the Government exemplified "a paradigm of the limited purpose public figure concept." *Id.* at 1211. The holding below and *McBride* cannot be squared.

The Sixth Circuit has also defined "the controversy" in terms of the controverted issues. *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981), involved an NBC historical drama about the trial of one of the "Scottsboro boys" in Alabama in the 1930's. Although the specific alleged libels all concerned NBC's portrayal of the events of the "crime" and the trial of one of the defendants, "the controversy" was not defined narrowly in terms of the particular trial. Rather the Sixth Circuit held that the plaintiff's status was to be determined in light of the "public controversy concerning the fairness of our criminal justice system . . . ." *Id.* at 1235.

The holdings of the Sixth and D.C. Circuits are clearly correct, and the Eighth Circuit is both in conflict with these circuits and in error. The greater the intensity of the controversy and the greater its import to the public, the greater will be the number of fora spanned by the ensuing debate. Thus, the Eighth Circuit would label as private persons the very individuals who are involved in controversies where the debate is the most intense and far reaching. We do not believe that a libel plaintiff can avoid public figure status by being deeply involved in a controversy but for whatever reason avoiding involvement at the precise focal point that prompted the libel suit. Rather, it is the totality of the nature and extent of the participation in the debate over the controverted public issues that determines the plaintiff's status, *Gertz v. Robert Welch, Inc.*, *supra* at 352; and here Bagley's involvement in the public issue regarding IBP was pervasive.

Finally, the Eighth Circuit erred in holding that unless Bagley was eagerly seeking media attention for himself, he was not a limited public figure. (P.A. A at 22-23.) The

limited public figure doctrine exists because broad and free discussion about private citizens who seek to influence the course of public issues is thought to be crucial to an adequate understanding and fair resolution of those issues. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147-48 (1967) (plurality opinion). Thus in determining whether a plaintiff is a limited purpose public figure, this Court has looked "to the nature and extent of [his or her] participation in the particular controversy giving rise to the defamation," *Gertz v. Robert Welch, Inc.*, *supra* at 352, and not to whether or not the plaintiff is a self-seeker of publicity.

Bagley's public figure status is thus not dependent upon whether he sought to influence the resolution of the issues by being "out front," or did so by quietly and surreptitiously collaborating with Congressional staffers and antitrust lawyers. One becomes a public figure whether he attempts to manipulate public issues by orchestrating events from behind the scenes, or by appearing in a spotlight at center stage. In either instance, such a person has elected to become embroiled in a public controversy and the fact of participation, as well as motives, biases, credibility and credentials, bear heavily upon an assessment of the public dialogue that is generated. The correct focus is thus not on the amount of media attention the plaintiff's activities have received. Rather, it is on whether the plaintiff's activities have in fact, as here, been directed to influencing the outcome of a controversy in which the public has a significant stake. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). *See also Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) ("[A] person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.").

In sum, the Eighth Circuit's truncated conception of "the controversy" and its focus on the media attention given to Bagley personally conflict with the decisions of this Court, of other Circuit Courts of Appeals, and with constitutional logic.

III.

THE EIGHTH CIRCUIT COMMITTED *BOSE* ERROR

In *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court held that when First Amendment principles are at stake, the appellate courts and, ultimately, this Court, will determine, after an independent review of the record, whether constitutional mandates have been obeyed. The *Bose* Court stated:

> [I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression."

466 U.S. at 499.

The Eighth Circuit's only reference to the *Bose* independent review requirement was its holding that it was not required to conduct such a review for evidence of actual malice because Bagley is a private person. (P.A. A opinion at 27.) The Court failed to recognize that the First Amendment mandates independent review not only of the actual malice determination, but of all First Amendment issues. *Bose Corporation v. Consumers Union of United States, Inc., supra* at 505-511; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (applying independent review standard to determination of whether alleged libel was germane to plaintiff's participation in the controversy); *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 897 (D.C. Cir. 1984) (independent appellate review applied to prior restraint and overbreadth questions); *Brasslett v. Cota*, 761 F.2d 827, 840 (1st Cir. 1985) (independent review requirement applied to claim that employee was discharged for criticizing superiors); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1088 (3d Cir.), *cert. denied*, 106 S.Ct. 182 (1985) (holding independent review of entire record required generally "[i]n First Amendment cases"); *Bender v. Williamsport Area School District*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), *vacated on other grounds*, 106 S.Ct. 1326 (1986) (*Bose*

mandates independent review of whether Establishment Clause prohibited on-campus meetings of high school students' religious organizations).

Thus even assuming, *arguendo*, that the Court below was correct that the only constitutional protection for IBP was the Speech Clause, the Court was obligated to independently review the record to determine Bagley's public or private figure status. *Bose Corporation v. Consumers Union of United States, Inc., supra.* There is not the slightest suggestion in any of the opinions that the Eighth Circuit did so. An independent search of the record would have disclosed overwhelmingly that Bagley had voluntarily thrust himself to the forefront of a controversy concerning the meat industry and IBP, and was a public person.

The Eighth Circuit may have concluded that *Bose* was inapplicable to a claimed exercise of the petition right because the Court placed it on a lower level of value than rights under the Speech and Press Clauses. However, the *Bose* opinion clearly requires an independent searching of the record whenever the First Amendment is involved. *Bose Corporation, supra* at 505-511. The policy reasons that prompted *Bose*—*i.e.*, to have an appellate court safety valve that the First Amendment is always strictly obeyed—are equally present where it is petitioning that is involved as when speech is involved.[19]

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[19] Moreover, because the actual malice standard is applicable to this case both under *McDonald* and because of Bagley's public figure status, the Eighth Circuit also erred in failing to conduct an independent review of the record to determine whether there was clear and convincing evidence of actual malice. *Bose Corporation, supra.* Bagley is not entitled to a retrial if, as is clearly the case, there is insufficient evidence of actual malice to support a jury verdict against IBP. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2514 (1986) (holding that even at the summary judgment stage the court is to relieve a libel defendant of the burden of proceeding to trial if the record discloses that the plaintiff cannot meet the constitutional standard). The record in this case is completely devoid of actual malice evidence and, in fact, Bagley's brief in the Eighth Circuit did not even purport to cite any evidence of actual malice. (Brief for Appellee.)

The Eighth Circuit's failure to conduct an independent review of the record supports in and of itself the issuance of the writ to review this case.

IV.

FIRST AMENDMENT RIGHTS ARE A SHAM IF HIGHLY INFLAMMATORY AND IRRELEVANT EVIDENCE IS ADMITTED

At trial, Bagley was permitted to introduce evidence of numerous alleged reprehensible acts of wrongdoing by IBP; those claimed acts were inflammatory and entirely unrelated to the issues. Bagley's charges ranged from price-fixing and predatory pricing to unfair labor practices and connections with the Mafia. (See Statement of the Case, *supra* at 10.)

The trial court did instruct that punitive damages for libel were precluded unless the jury found that the defendant had acted with actual malice.[20] (P.A. A at 26.) Not surprisingly, the jury nevertheless returned a punitive award of $5 million on the libel claim, and a total punitive award of $7.25 million.

The protections that this Court has declared to be required by the First Amendment are sterile and meaningless if jurors are grossly inflamed by allowing them to believe that Attila the Hun or Al Capone is before them. The only Court of Appeals that has expressly considered the issue, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1489 (1986), held that:

> Although the district judge enjoys a broad discretion in balancing prejudice and probative value under Rule 403, we think he exceeded the limits of that discretion in

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[20] That instruction, however, did not contain a correct allocation of the burden of proving falsity; the trial court's assignment to IBP of the burden of proving truth served as the basis for the unanimous reversal of the plaintiff's libel judgment by the Eighth Circuit. (P.A. A at 25-27.) The instruction also failed to properly limit the jury's consideration of whether there was actual malice to the two statements alleged to be libelous, or even to those statements in the letter that were of and concerning Bagley. (Jury instruction 27.)

> this instance, and note that he himself remarked after the slide show that he had made a mistake in allowing it. In another setting such a mistake might not warrant a new trial. But the Supreme Court has told us (most recently in the *Bose* case, see 104 S.Ct. at 1962) to be assiduous in protecting the press, even in its least worthy manifestations, from the fury of outraged juries.

Id. at 1142.

This Court has held in cases involving other important constitutional rights that a proper jury instruction at the end of a trial does not cure egregious trial errors that, in effect, render jury instructions virtually worthless. *See Bruton v. United States*, 391 U.S. 123 (1968) (holding that a criminal defendant's Sixth Amendment rights are not adequately protected by a jury instruction that his co-defendant's confession cannot be considered by the jury in determining the non-confessing defendant's guilt). The principle certainly applies where First Amendment rights are at stake. Trials must be conducted with appropriate respect for First Amendment and fairness requirements throughout—not just when instructing the jury.

We respectfully suggest this case raises for the first time the question of the interplay between the First Amendment and the trial judge's evidentiary discretion.

V.

BAGLEY'S TORTIOUS INTERFERENCE JUDGMENTS WERE THE RESULT OF A FUNDAMENTALLY UNFAIR TRIAL

A litigant is denied due process of law when the procedures employed by a trial court fail to provide him a fundamentally fair hearing. *Walker v. Engle*, 703 F.2d 959, 968-69 (6th Cir.), *cert. denied*, 464 U.S. 962 and 951 (Rehnquist, J., dissenting) (1983); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied*, 419 U.S. 1042 (1980). The Due Process Clause does not guarantee litigants a perfect trial, but it does guarantee basic procedural fairness.

All semblance of fairness to IBP was destroyed by the district court's rulings on evidence, argument and jury instructions. The court admitted evidence of every immaterial alleged past sin of IBP that Bagley's counsel could dredge up. (See Statement of the Case, *supra* at 10.) Then the court permitted Bagley's lawyer to argue to the jury that even more was known about how despicable IBP was than the jury had been told. (Tr. 2209.) Finally, the court refused to give IBP's proffered instruction, or indeed *any* instruction, on justification in connection with Bagley's claims for tortious interference—in effect ruling, contrary to settled common law, that IBP could not escape liability no matter how justified its conduct may have been. (Tr. 2204.)

This repeated and egregious unconcern for the laws of evidence and final argument denied IBP a fair hearing and resulted, *inter alia*, in a $650,000 judgment for tortious interference with present employment which was permitted to stand by the Eighth Circuit.[21] (P.A. A at 28.) We recognize the wide latitude of the trial judge on matters of evidence and argument, and the heavy burden we have to show that due process has been offended as a result of rulings on those matters. But we believe that here the district court's rulings on evidence, argument and jury instructions exceed all the bounds and, at the very least, consititute so great a departure from proper judicial procedure as to call for an exercise of this Court's power of supervision. It was as if the district court had held that there would be no rules of evidence, no limitation on argument, and that IBP was not entitled to any justification.

In *Walker v. Engle*, *supra*, the Sixth Circuit, faced with precisely this kind of evidence and argument, held:

> It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness. The trial was inflamed by marginally relevant

[21] In addition, the separate judgment for tortious interference with prospective employment was remanded with instructions that it be reinstated to the extent that it did not duplicate recovery on the libel claim. (P.A. A opinion at 29-30.)

> and irrelevant evidence that was highly prejudicial. . . . [T]he trial court denied [the defendant] due process of law in violation of the Constitution.

Id. at 968-69.[22]

This Court has similarly reversed judgments where the jury's exposure to prejudicial information has denied the defendant the procedural fairness our system demands. *See Marshall v. United States*, 360 U.S. 310 (1959) (holding based on the Court's exercise of its supervisory power over the federal courts).

CONCLUSION

For the foregoing reasons, Petitioner IBP, inc. prays that this Court issue a writ of certiorari to review the Eighth Circuit's judgment in this case.

Respectfully submitted,

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[22] *Walker* was a criminal case; the Due Process Clause requires fundamental fairness in civil, as well as criminal, trials. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).